Supreme Court, U.S.
FILED
97137 1 JAN 27 1997
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DAVID DUFFY,

Petitioner,

v.

CHARLES R. WOLLE, HAROLD D. VIETOR, and RONALD E. LONGSTAFF,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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January 27, 1998

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QUESTIONS PRESENTED

1. When should a District Court under Rule 56(f) of the Federal Rules of Civil Procedure either refuse summary judgment or order a continuance to permit discovery to be taken when presented with a timely affidavit by a party opposing summary judgment indicating an inability to demonstrate by affidavit facts essential to oppose summary judgment?

2. In considering a request to postpone a ruling on summary judgment under Rule 56(f) of the Federal Rules of Civil Procedure in a case maintained against public officials asserting a defense of qualified immunity what considerations should guide a District Court?

3. When and under what circumstances should a Plaintiff in a case of employment discrimination involving alleged disparate treatment be denied the opportunity to engage in discovery on the issue of pretext?

PARTIES TO THE PROCEEDING

The parties to this proceeding are as follows:

The Petitioner is David Duffy.

The Respondents are Charles R. Wolle, Harold D. Vietor, and Ronald E. Longstaff, in their individual and official capacities. The Respondents are the Judges in active service of the United States District Court for the Southern District of Iowa.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 10

INTRODUCTION 10

I. THE DECISION OF THE EIGHTH CIRCUIT IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL CONCERNING A MATTER OF IMPORTANCE IN THE ADMINISTRATION OF THE CIVIL JUSTICE SYSTEM . . . 13

II. THE DECISION OF THE EIGHTH CIRCUIT ENDORSES AN UNWARRANTED EXTENSION OF THE QUALIFIED IMMUNITY DOCTRINE 18

III. THE OPINION OF THE EIGHTH CIRCUIT EFFECTIVELY DENIES A PLAINTIFF IN AN EMPLOYMENT DISCRIMINATION CLAIM A FULL AND FAIR OPPORTUNITY TO REBUT THE NONDISCRIMINATORY EXPLANATION ADVANCED BY AN EMPLOYER AS A JUSTIFICATION FOR ITS DECISION 21

CONCLUSION 23

APPENDIX ..... *infra*

TABLE OF AUTHORITIES

CASES: PAGE

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 18

Batson v. Kentucky, 476 U.S. 79 (1986) 14

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) 1

Bryant v. O'Connor, 848 F.2d 1064 (10th Cir. 1988) 9, 18

Burns v. Gadsden State Community College, 908 F.2d 1512 (11th Cir. 1990) 17

Celotex Corporation v. Catrett, 477 U.S. 317 (1986) 3, 13, 17

Dunkin' Donuts of AM. v. Metallurgical Exoproducts, 840 F.2d 917 (Fed. Cir. 1988) 15

Evans v. Technologies Applications & Service Company, 80 F.3d 954 (4th Cir. 1996) 16

Gardner v. Howard, 109 F.3d 427 (8th Cir. 1997) . . 15

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 19

Johnson v. Jones, 515 U.S. 304 (1995) 19

Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993) 21

McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973) 14, 21

Meloff v. New York Life Insurance Company, 51 F.3d 372 (2nd Cir. 1995) 15

Mitchell v. Forsyth, 472 U.S. 511 (1985) 19

San Filippo v. Bongiovanni, 30 F.3d 424 (3rd Cir. 1994) 16

St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993) 22

Siegert v. Gilley, 500 U.S. 226 (1991) 20

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) 22

Vance v. United States, 90 F.3d 1145 (6th Cir. 1996) 16

White's Landing Fisheries, Inc. v. Buchholzer, 29 F.3d 229 (6th Cir. 1994) 16

Wichita Falls Office Associates v. Banc One Corporation, 978 F.2d 915 (5th Cir. 1992) 16

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES:

Fifth Amendment to the United States Constitution 2

Rule 8 of the Federal Rules of Civil Procedure 21

Rule 12(b)(6) of the Federal Rules of Civil Procedure 8

Rule 56(c) of the Federal Rules of Civil Procedure 2, 3

Rule 56(f) of the Federal Rules of Civil Procedure . . . . . *passim*

18 United States Code §3602 4

28 United States Code §1254 2
28 United States Code §1291 1
28 United States Code §1331 1
Title VII of the Civil Rights Act of 1964 . . . . . 8, 14
Section 1983 of the Civil Rights Act of 1964 21

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, DAVID DUFFY, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above entitled proceeding on August 19, 1997.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 123 F.3d 1026 (8th Cir. 1997) and is reprinted in the appendix to this petition beginning at App. 1.

The decision and opinion of the United States District Court for the Southern District of Iowa is not published and is reprinted in the appendix to this petition beginning at App. 31.

JURISDICTION

The Petitioner invoked the jurisdiction of the District Court relying upon both *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) and 28 United States Code §1331. On August 1, 1996 the District Court granted the Respondents' motion to dismiss considering it as a motion for summary judgment.

The Court of Appeals for the Eighth Circuit had jurisdiction of this case under 28 United States Code §1291. On August 19, 1997 the Court of Appeals entered a judgment and opinion affirming the judgment of the District Court. In its opinion it held that the Respondents

were entitled to summary judgment prior to discovery even though: 1) the Petitioner's complaint stated a viable constitutional claim against the Respondents; 2) the claim of the Petitioner was based upon law which was clearly established at the time his causé of action arose; and 3) the Petitioner had adequately demonstrated by affidavit a prima facie claim of reverse gender discrimination. The Court of Appeals further held that the District Court did not abuse its discretion in declining to afford the Petitioner discovery prior to granting summary judgment.

On October 29, 1997 the Court of Appeals denied Petitioner's request for rehearing with suggestions for rehearing en banc.

This Court has jurisdiction to review this case under 28 United States Code §1254.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

Fifth Amendment to the United States Constitution:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

Rule 56 of the Federal Rules of Civil Procedure:

> **(c) Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show

that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

STATEMENT OF THE CASE

This case was decided by the District Court on a motion to dismiss which was treated by it as a motion for summary judgment. Rule 56(c) of the Federal Rules of Civil Procedure mandates the entry of summary judgment after adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of a genuine dispute of fact on an element essential to his case and upon which he will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

On December 7, 1993 Edwin Ailts submitted to the Respondents his resignation as Chief United States Probation Officer for the United States District Court for the Southern District of Iowa which would become effective

on April 29, 1994. Earlier, he had informed them of his intention to resign.

The Respondents as the judges in active service of the United States District Court for the Southern District of Iowa had the administrative responsibility to appoint Mr. Ailts' successor under 18 United States Code §3602.

In the fall of 1993 the Respondent, Charles Wolle, as the Chief Judge of the Court attended a conference in Washington D.C. sponsored by the Administrative Office of the United States Courts. According to him he was informed that in selecting a new Chief Probation Officer the Respondents should advertise the position in a publication of national circulation to reach all persons who might be interested in order to secure an open, nationwide and diverse pool of qualified applicants. Upon his return from the conference he had a conversation with Mr. Ailts, who recalls that Judge Wolle informed him that while in Washington he had received information about an interest in the appointment of a female. Mr. Ailts assumed he was referring to the Chief Probation Officer position since he had only recently announced his intention to retire and that was the only vacant position which existed. Thereafter, Mr. Ailts had a conversation with the Petitioner. According to the Petitioner Mr. Ailts informed him that Judge Wolle had recently returned from a conference with the Administrative Office of the United States Courts and had been encouraged to engage in an aggressive effort to recruit minorities and females as candidates for the position of Chief Probation Officer.

After becoming aware of Mr. Ailts' intention to retire the Respondents established a screening panel to review all applications submitted for the position of Chief Pro-

bation Officer and to submit a list of three to seven applicants who would be interviewed for that position by the Respondents. Included on that committee were Judge Longstaff and Mr. Ailts. They also prepared a vacancy announcement which was published in *News and Views*, a publication of the Probation Division of the Administrative Office of the United States Courts, which advertised the Chief Probation Officer position. The announcement described the position and its duties, set forth the qualifications for the position and described the application process. In order to be qualified for the position an applicant was required to have a four year degree and preferably an advanced degree from an accredited college with specialization in one or more of the social sciences which were appropriate to the position as well as progressively more responsible specialized experience, including management responsibility, in the investigation, supervision, counseling and guidance of offenders in community corrections or pre-trial programs. The duties of the position included: a) organizing the probation office to effectively handle the investigation and supervision of pre-trial cases and probationers; b) recruiting and supervising the staff of the probation office; c) preparing estimates of personnel needs and operating budgets; d) soliciting and negotiating substance abuse and mental health care service contracts; e) maintaining a liaison with the Court and a cooperative relationship with other organizations involved with the criminal justice system; and f) reviewing and interpreting various requirements for the administration of the probation office and promulgating policies needed to meet those requirements.

The screening committee decided that any applicant who was currently employed by the probation office

would be included among the applicants submitted to the Respondents for an interview. It submitted to the Respondents the names of three candidates, the Petitioner, L. Jane McPhillips and John Stites. The Petitioner and Mr. Stites were current employees of the probation office while Ms. McPhillips was a probation officer in the District of Minnesota.

The Petitioner held a master's degree with emphasis in rehabilitation, psychological counseling and corrections and had pursued doctoral studies in educational and school psychology. He had been employed as a probation officer in the Southern District of Iowa since 1974 and in early 1994 was its Chief Deputy Probation Officer. During his years of service in the probation office the Petitioner had held both line, supervisory and administrative positions in each of the three functional areas of the probation office. He had served as both a pre-trial service officer and a supervisor in the pre-trial unit. He was a pre-sentence writer in the pre-sentence unit and for four years when the Chief Probation Officer was absent was responsible for supervising that unit. He had served as a probation officer in the supervision unit and for four years had supervisory responsibility for that unit. His administrative assignments in the probation office included serving as the pre-trial division coordinator, the training coordinator, the sentencing guidelines expert and the drug treatment contract specialist. He had developed the drug treatment program of the probation office which was utilized with respect to most individuals who came under its jurisdiction. He began performing supervisory responsibilities in 1989 and by 1994 was the second highest ranking official in the probation office. During absences by the Chief Probation Officer the Peti-

tioner assumed supervisory responsibilities for the probation office and filled in for the Chief Probation Officer periodically at executive meetings. He had received management training and had attended training seminars conducted for Chief Probation Officers. Throughout his employment in the probation office he was consistently given the highest performance ratings.

Ms. McPhillips had both a master's degree and a law degree. She had served as a probation officer since 1972 in both the Northern District of Texas and the District of Minnesota. Unlike the Petitioner Ms. McPhillips' background was limited to only one of the functional units of the probation office and she had less supervisory and administrative experience than the Petitioner. Most of her background consisted of working as a line probation officer in the area of presentence investigation. She had also served temporary duty positions with both the Administrative Office of the United States Courts and the United States Sentencing Commission.

The Respondents interviewed each of the three applicants referred to them by the screening committee. During his interview the Petitioner was asked what he would do if he did not receive the position of Chief Probation Officer.

The Respondents were personally familiar with both the Petitioner and John Stites who worked in the probation office. They were unfamiliar with Ms. McPhillips. They secured favorable recommendations for her from several of the sitting judges of the District of Minnesota. When asked by Judge Longstaff for a recommendation Mr. Ailts, who was also serving as a member of the screening committee, recommended the Petitioner for Chief Probation Officer.

Following the interviews the Respondents selected L. Jane McPhillips for the position. Thereafter, the Petitioner spoke with both Judge Longstaff and Judge Wolle concerning the selection decision. During these conversations he was given no reason why he was not awarded the position and was encouraged by Judge Wolle to continue pursuing his "cutting edge ideas" for the operation, management and development of the probation office.

Following his appointment to the federal bench in 1987 Judge Wolle has employed eight individuals to serve him as law clerks. Six of those individuals were females. Judge Longstaff following his appointment to the bench in 1991 had employed nine different individuals as law clerks, only one of whom was a male.

The Petitioner initiated this proceeding before the District Court contending that he was the victim of gender discrimination in being passed over for the Chief Probation Officer position contrary to his rights under the equal protection component of the Due Process Clause of the Fifth Amendment to the Constitution.[1] The Respondents' initial response to the lawsuit came in the form of a combined motion to dismiss and a motion for summary judgment maintained under Rules 12(B)(6) and 56 of the Federal Rules of Civil Procedure. In their motion the Respondents advanced five reasons why the Petitioner's claim was infirm as a matter of law. Additionally, each of the Respondents submitted an affidavit claiming that gender was not a reason behind the selection decision

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[1] Because of his status as an employee of the Court the Petitioner is not a member of the competitive service and thus is not protected by Title VII of the "Civil Rights Act of 1964".

and that Ms. McPhillips was determined by them to be the best qualified candidate for the position.

The Petitioner's submission to the District Court in response to the Respondents' motion included the affidavits of Mr. Ailts, his counsel and himself.[2] The District Court rejected the contention of the Respondents that the Petitioner's claim was infirm as a matter of law. It did, nonetheless, grant the Respondents' motion for summary judgment relying upon *Bryant v. O'Connor*, 848 F.2d 1064 (10th Cir. 1988) and the doctrine of qualified immunity. While acknowledging that the Petitioner's constitutional claim was based upon law which was clearly established at the time of the alleged wrong, it rejected his claim after reviewing the Respondents' affidavits reasoning that the Petitioner had "insufficient support for his claims" and policy considerations mandate the dismissal of his claim to avoid subjecting federal officials to the expense and distraction of trial.

Although not adopting the analysis of the District Court the Eighth Circuit, nonetheless, affirmed its decision. Like the District Court it rejected the Respondents' challenge to the legal sufficiency of the Petitioner's claim. It further concluded that his claim was predicated

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[2] The affidavit of the Petitioner's counsel was submitted pursuant to Rule 56(f) of the Federal Rules of Civil Procedure. It requested the opportunity to engage in limited discovery before the District Court ruled upon the fact based components of the Respondents' motion. In this respect it indicated that the Petitioner was prepared to make a factual showing of the necessary elements of his prima facie claim, but requested the opportunity to engage in discovery with respect to the reasons advanced by the Respondents for their selection decision prior to the Court determining whether a genuine issue of fact existed as to whether those reasons were pretextual.

upon clearly established law and recognized that the Petitioner had made a satisfactory factual showing of a prima facie claim of reverse gender discrimination. Once determining the Petitioner's claim was based upon clearly established law it undertook an analysis of the merits of his claim recognizing that at that point "the defense of qualified immunity begins to look like a ruling on the merits". It concluded that the Petitioner was unable to demonstrate the existence of a genuine issue of fact that the reasons advanced by the Respondents for promoting the female as set forth in their affidavits were pretextual. It went on to conclude that the District Court did not abuse its discretion in denying the Petitioner the opportunity to engage in discovery since "Rule 56(f) does not condone a fishing expedition where a plaintiff merely hopes to uncover some possible evidence of a constitutional violation."

REASONS FOR GRANTING THE WRIT

INTRODUCTION

Rule 56(f) of the Federal Rules of Civil Procedure permits but does not require a District Court to either decline or defer ruling upon a motion for summary judgment in order to allow the nonmovant to obtain evidence or take discovery when by affidavit he presents reasons why he cannot present by affidavit facts essential to his opposition. The Rule does not set forth factors which should guide the District Court in exercising this discretion.

This case presents the question of when and under what circumstances it is proper under the foregoing rule to deny an opponent of summary judgment the opportu-

nity to take any discovery prior to a ruling on a fact based motion for summary judgment. Both the District Court and the Eighth Circuit concluded that the Respondents were entitled to summary judgment because of the Petitioner's inability to present evidence sufficient to create a genuine issue of material fact that the reasons given by the Respondents for not promoting him were pretextual.

The Petitioner through his counsel's affidavit made a timely request to the District Court that it defer ruling upon the Respondents' motion for summary judgment until the Petitioner conducted discovery and had the opportunity to depose each of the Respondents in order to gather evidence to make a presentation that the Respondents' explanation for their actions was a pretext for unlawful discrimination. At the time this request was made the Petitioner had demonstrated that: 1) his claim under the Fifth Amendment was sufficient as a matter of law; 2) the legal defenses advanced by the Respondents to the Petitioner's claim were without merit; 3) his claim was based upon law which was clearly stated at the time of the alleged wrong; and 4) he had facts sufficient to demonstrate a prima facie claim of reverse gender discrimination. Because the Respondents' effort to dismiss his claim came at the threshold stage of the case the Petitioner had no opportunity to engage in any discovery prior to the District Court's ruling.

In the event it issues a writ of certiorari this Court would consider how a District Court should exercise its discretion under Rule 56(f) when: a) the party opposing summary judgment has not been dilatory in seeking discovery and has demonstrated the legal sufficiency of his claim; b) the evidence needed to combat summary judg-

ment lies peculiarly within the possession of the movant and is not readily accessible absent discovery; and c) the defendants are public officials entitled to qualified immunity.

For several reasons the questions raised in this petition warrant consideration by this Court.

First, summary judgment is playing an increasingly more important role in the administration of the civil justice system and because of its increasing importance this Court's guidance concerning the proper exercise of the discretion given to the District Courts under Rule 56(f) would be valuable.

Second, the holding of the Eighth Circuit is in direct conflict with other circuits as to when summary judgment should be granted when the party opposing summary judgment has had no prior opportunity to engage in discovery.

Third, the holdings of both the District Court and the Eighth Circuit appear to be sensitive to the status of the Respondents as public officials entitled to qualified immunity. Thus, this case raises the question of how Rule 56(f) should be reconciled with the qualified immunity doctrine. On this important issue of federal law the decision of the Eighth Circuit appears to conflict with relevant decisions of this Court. Further, there is need for this Court to clarify what a plaintiff must establish as a precondition to discovery when confronted with a qualified immunity defense.

Finally, the decision of the Eighth Circuit approves granting summary judgment to an employer in an employment discrimination case prior to affording the claimant an opportunity to engage in discovery when the

disputed factual issue turns upon the employer's motivations for the challenged action. In its opinion it decides an important question of federal law in a manner which conflicts with relevant decisions of this Court.

I. THE DECISION OF THE EIGHTH CIRCUIT IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL CONCERNING A MATTER OF IMPORTANCE IN THE ADMINISTRATION OF THE CIVIL JUSTICE SYSTEM

Prior to 1986 summary judgment was commonly considered a drastic remedy sparingly employed in the disposition of civil lawsuits. In *Celotex Corporation v. Catrett*, 477 U.S. 317, 327 (1986) this Court dispelled that notion and recognized that summary judgment is an important tool in the civil justice system to secure a just, speedy and inexpensive determination of controversies. It concluded that Rule 56 must be applied with an appropriate sensitivity to not only the rights of individuals having sufficient evidence to warrant trial by jury, but also to those individuals opposing claims that have no factual basis. Thus, a moving party is entitled to summary judgment as a matter of law if the nonmovant fails to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof. *Celotex Corporation*, 477 U.S. at 323.

The Eighth Circuit correctly recognized that in order to ultimately prevail with respect to the merits of his claim the Petitioner must at the very least demonstrate that the reasons advanced by the Respondents for not appointing him Chief Probation Officer were pretextual. It reasoned that the Respondents through their affidavits had set forth nondiscriminatory reasons for selecting the

female candidate over the Petitioner and the Petitioner failed to make a sufficient factual showing that those reasons were pretextual.[3] Although recognizing that the Petitioner had made a sufficient factual showing of a prima facie claim of reverse discrimination it concluded that the District Court did not abuse its discretion in denying the Petitioner the opportunity to engage in discovery before granting the Respondents' summary judgment because the Petitioner "made no supportable allegations of discrimination" and discovery would involve a "fishing expedition" on the part of the Petitioner to uncover further evidence of gender discrimination.[4]

Even though the information needed by the Petitioner to rebut the Respondents' explanations for the selection decision was within the control of the Respondents and

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[3] Although the Petitioner's claim of gender discrimination arose under the Constitution rather than Title VII of the "Civil Rights Act of 1964" the Eighth Circuit evaluated the evidence in the summary judgment proceeding under the indirect proof method first permitted by this Court in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973). The use of that proof model has been approved in purposeful discrimination claims maintained upon the Equal Protection Clause. *Batson v. Kentucky*, 476 U.S. 79 (1986).

[4] The Eighth Circuit in its opinion took note of the Petitioner's failure to contest the assertions of the Respondents that the female applicant received "glowing recommendations from Minnesota jurists" and the Respondents' perceptions of her interviewing skills. Information relating to those subjects was exclusively under the control of the Respondents and absent the opportunity to engage in discovery the Petitioner was not able to explore how the recommendations of the Minnesota jurists with respect to the female were more compelling than Mr. Ailts' recommendations with respect to the Petitioner or the relative performances of the female and the Petitioner during their interviews.

not readily accessible to the Petitioner absent discovery and the Petitioner had no prior opportunity to engage in discovery the Eighth Circuit, nonetheless, concluded that the District Court did not abuse its discretions in denying the Petitioner's Rule 56(f) request that the summary judgment ruling be postponed. Its holding in this respect is in direct conflict with the holdings from several of its sister circuits.[5]

In *Dunkin' Donuts of AM. v. Metallurgical Exoproducts*, 840 F.2d 917, 919 (Fed. Cir. 1988) the Federal Circuit concluded that a trial court abused its discretion in granting summary judgment without affording the party opposing summary judgment who had made a Rule 56(f) request a reasonable opportunity to engage in discovery.

In *Meloff v. New York Life Insurance Company*, 51 F.3d 372, 375 (2nd Cir. 1995) the Second Circuit concluded that the District Court abused its discretion in granting summary judgment in an employment discrimination case where the Plaintiff was unable to make a factual showing of pretext and refusing to defer its con-

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[5] In *Gardner v. Howard*, 109 F.3d 427, 431 (8th Cir. 1997) the Eighth Circuit in another case involving public officials in which qualified immunity was at issue recognized the right of a party opposing summary judgment to submit a Rule 56(f) affidavit, but required such an affidavit to explain "in detail" what evidence could be obtained if the court delayed a summary judgment ruling. It further held that absent such a specific showing Rule 56(f) does not condone a fishing expedition. Thus, the Eighth Circuit has developed a very restrictive test for determining when a District Court might properly exercise its discretion to defer ruling on a motion for summary judgment to enable the opposing party to undertake discovery.

sideration of that motion until the plaintiff had reasonable opportunity to conduct further discovery.

In *San Filippo v. Bongiovanni*, 30 F.3d 424, 432 (3rd Cir. 1994) the Third Circuit held that a trial court abused its discretion in denying a plaintiff in an employment discrimination case the opportunity to conduct discovery before ruling on the employer's motion for summary judgment. It reasoned that where relevant information sought is in the hands of the moving party a District Court should grant the nonmovant relief under Rule 56(f) almost as a matter of course.

In *Wichita Falls Office Associates v. Banc One Corporation*, 978 F.2d 915, 918-920 (5th Cir. 1992) the Fifth Circuit determined that the trial court abused its discretion under Rule 56(f) in granting summary judgment without allowing the nonmovant the opportunity to pursue further discovery recognizing that the continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course unless the nonmovant has not diligently pursued discovery.

In *Evans v. Technologies Applications & Service Company*, 80 F.3d 954, 961 (4th Cir. 1996) the Fourth Circuit although affirming summary judgment nonetheless recognized that when a proper request is made by a nonmovant under Rule 56(f) summary judgment must be refused where the nonmoving party has not had the opportunity to discover information essential to its opposition.

In *Vance v. United States*, 90 F.3d 1145, 1148-1149 (6th Cir. 1996) and *White's Landing Fisheries, Inc. v. Buchholzer*, 29 F.3d 229, 231-232 (6th Cir. 1994) the

Sixth Circuit recognized that a District Court's entry of summary judgment without permitting a party to conduct any discovery will constitute an abuse of discretion if the party opposing summary judgment makes a proper and timely showing of the need for discovery.

In *Burns v. Gadsden State Community College*, 908 F.2d 1512 (11th Cir. 1990) the Eleventh Circuit in a case of employment discrimination concluded that the trial court abused its discretion in ruling on a motion for summary judgment when the party opposing the motion had not received responses to its outstanding discovery requests because the responses could have had a direct bearing on his ability to respond to the employer's motion for summary judgment.

Thus, the Second, Third, Fourth, Fifth, Sixth, Eleventh, and Federal Circuits when confronted with a situation similar to the present case have all concluded contrary to the Eighth Circuit that it is an abuse of discretion for a District Court to grant summary judgment without affording the opponent an opportunity to engage in discovery.

Although this Court has not addressed the specific issue presented in this case it has nonetheless recognized the importance of a party opposing summary judgment to have a fair opportunity to engage in discovery with respect to matters relevant to the issues in the summary judgment proceeding.

In *Celotex Corp.*, 477 U.S. at 322-323 it recognized that summary judgment should be granted when a nonmoving party fails to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof, but only after he has had

adequate time for discovery. In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) it recognized that a party opposing summary judgment must set forth specific facts showing that a genuine fact issue remains for trial, but qualified that observation by noting that Rule 56(f) contemplates that summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition. *Anderson* at footnote 5.

II. THE DECISION OF THE EIGHTH CIRCUIT ENDORSES AN UNWARRANTED EXTENSION OF THE QUALIFIED IMMUNITY DOCTRINE

The District Court in granting summary judgment squarely relied upon the qualified immunity doctrine holding that the Petitioner's claim had insufficient evidentiary support and good policy mandated that federal judicial officers not be exposed to the expense and distraction of trial. The Eighth Circuit although not squarely embracing that rationale was nonetheless sensitive to the Respondents' status as members of the federal judiciary entitled to qualified immunity. In its opinion it cites with approval the decision of the Tenth Circuit in *Bryant v. O'Connor*, 848 F.2d 1064 (10th Cir. 1988) and reasons that Rule 56(f) should not be utilized to enable a plaintiff to conduct a fishing expedition which would be disruptive to the federal judiciary. Thus, the holding of the Eighth Circuit creates a tension between Rule 56(f) and the qualified immunity doctrine.

Clearly public officials including federal judges are entitled under qualified immunity to the resolution of insubstantial claims on summary judgment in order to be spared the burden of trial or broad reaching discovery

in cases where the legal norms which the officials are alleged to have violated are not clearly established at the time of the alleged misconduct. *Harlow v. Fitzgerald*, 457 U.S. 800, 817-818 (1982). In *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) this Court stated:

> "Unless the plaintiff's allegations state a claim of violation of clearly established law a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery—even if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts. *Harlow* thus recognized an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question of whether the conduct of which the plaintiff complains violated clearly established law" [p.526].

It went on to recognize the separability between qualified immunity and the underlying merits of a plaintiff's claim stating that a claim of immunity need not consider the correctness of the plaintiff's version of the facts but rather whether the legal norms alleged to be violated by the defendant were clearly established at the time of the alleged wrong.[6]

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[6] This Court in *Johnson v. Jones*, 515 U.S. 304 (1995) also recognized the conceptual distinctness of qualified immunity from the factual merits of the underlying claim. It observed that the factual inquiry with respect to a qualified immunity defense does not turn upon the correctness of the plaintiff's version of the facts.

Thus, in the wake of *Mitchell* the defense of qualified immunity appears to involve a three prong inquiry. First, has a plaintiff asserted a violation of a constitutional right. Second, if the plaintiff has made such an assertion was the right clearly established at the time of the alleged wrong. Third, is there any genuine issue of material fact as to whether a reasonable official given the factual context of the claim would have known that his alleged actions violated such a right.

Both the Eighth Circuit in this case and the Tenth Circuit in *Bryant* create an additional hurdle which a claimant must leap in order to pursue discovery in a claim maintained against a federal judge by essentially requiring him as a precondition to the right to engage in discovery to demonstrate the existence of evidence sufficient to withstand summary judgment on each element for which he bears the burden of proof. Thus, contrary to dictates of this Court in both *Mitchell* and *Johnson* the Eighth Circuit in this case as well as the Tenth Circuit in *Bryant* have intertwined the defense of qualified immunity with the underlying factual merits of a plaintiff's claim.

Notwithstanding *Mitchell* it remains unclear concerning the burden a plaintiff must satisfy when confronted with a qualified immunity defense in a case involving the intent of public officials before being entitled to embark upon discovery. In his concurring opinion in *Siegert v. Gilley*, 500 U.S. 226 (1991) Mr. Justice Kennedy adopted the view of the District of Colombia Circuit suggesting that upon being presented with a qualified immunity defense a plaintiff must present specific, nonconclusionary allegations which would establish the requisite intent through either direct or circumstantial evidence

before engaging in discovery. This Court has neither embraced nor rejected that view. In *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993) this Court held that imposing a civil rights plaintiff with a heightened pleading requirement in a section 1983 claim against a municipal body could not be squared with Rule 8 of the Federal Rules of Civil Procedure. It specifically did not decide whether the federal courts may employ a heightened pleading standard in qualified immunity cases. Thus, it remains unsettled what, if anything, a plaintiff must do in a constitutional claim of employment discrimination after demonstrating that his claim is predicated upon clearly stated law in order to advance to discovery. In view of the frequency in which the defense of qualified immunity arises in claims against public officials the guidance of this Court on that question is of some importance.

III. THE OPINION OF THE EIGHTH CIRCUIT EFFECTIVELY DENIES A PLAINTIFF IN AN EMPLOYMENT DISCRIMINATION CLAIM A FULL AND FAIR OPPORTUNITY TO REBUT THE NONDISCRIMINATORY EXPLANATION ADVANCED BY AN EMPLOYER AS A JUSTIFICATION FOR ITS DECISION

In *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973) this Court established an allocation of the burden of production of evidence and the order for the presentation of proof in an employment discrimination claim of disparate treatment. Under this scheme a plaintiff has an initial obligation to present evidence creating a presumption that the employer unlawfully discriminated against him. If he does, the employer bears the burden of producing evidence consisting of an

explanation that the challenged action was taken for legitimate, nondiscriminatory reasons.

If the defendant carries this burden of production the presumption of discrimination previously created by the plaintiff is rebutted. He then has "the full and fair opportunity to demonstrate" that the proffered reason was not the true reason for the employment decision and that prohibited discrimination was. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 255-256 (1981). A fact finder's disbelief of the reasons put forward by an employer as justification for its actions coupled with the evidence advanced by a plaintiff in support of his prima facie claim is sufficient to permit, but not compel, a trier of fact to infer the ultimate fact of intentional discrimination. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

In a claim of employment discrimination the motive or intent of the employer for its action is generally the critical issue in dispute. Typically, evidence turning upon its motives and particularly the legitimacy of an employer's explanation for its decision lies within the possession of the employer and absent discovery is not readily accessible to a claimant. The holding of the Eighth Circuit in this case implicates the burden of a plaintiff in advancing an intentional discrimination claim. The Eighth Circuit in this case permitted a District Court in exercising its discretion under Rule 56(f) to effectively require a plaintiff in an employment discrimination claim as a prerequisite to discovery to present evidence sufficient to not only establish a prima facie claim of discrimination but also to discredit the explanation offered by the employer for its actions. Such a holding would have a chilling effect on claimants' efforts in

advancing claims of employment discrimination since such evidence oftentimes rests within the province of the employer. It also deviates from this Court's admonition in *Burdine* that a plaintiff be afforded a full and fair opportunity to challenge his employer's justifications for its actions. If the plaintiff is unable to engage in discovery with respect to the bases for the employer's decision then a full and fair opportunity is denied.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the questions in this petition.

Respectfully submitted,

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